

IN THE HIGH COURT OF JUDICATURE OF TRAVANCORE-COCHIN

Before  
The Hon'ble Shri K.T. Koshi, Chief Justice and  
The Hon'ble Shri G. Kumara Pillai, Judge.

Appeal Suit No. 12 of 1955.

C.S. No. 15 of 1102 of the Kottayam District Court.

Appellant - 12th defendant

Kunju Moethian Kotharu Mohammed Ketharu, residing at Mangalathu  
Veliyil, Aroor Mari, Aroor Pakuthy.

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By advocate Shri S. Theethalingam Iyer.

Respondent - plaintiff

The Bank of Deccan Ltd., Kottayam, represented by its  
Managing Director; Chandy Itty.

By advocate Shri K.T. Vinan.

This appeal suit having been finally heard on 23.3.1955  
the court on 23.3.1955 delivered the following

(Koshi, C.J. and Kumara Pillai, J.)

Appeal Suit No. 12 of 1955.

JUDGMENT.

Delivered by Kumara Pillai, J.

This appeal arises out of an order in execution. The appellant is additional defendant 12, who was impleaded in execution after the death of defendant 3 as the latter's legal representative. The order appealed against is one dismissing a claim made by additional defendant 12 to a property which was attached in execution as belonging to defendant 3. According to the appellant, he purchased this property in execution of a decree he himself has obtained on a hypothecation bond executed by his deceased father, defendant 3 and the property belonged to him at the time of the attachment in this case and was not liable to be attached and sold in execution of the decree, ~~in this case~~. The decree-holder is a Joint Stock Bank, known as The Bank of Deccan Ltd. The Bank opposed the claim contending that the decree and court sale relied upon by the appellant were sham transactions brought into existence for the purpose of shielding the property from the creditors of defendant 3 and that notwithstanding the said decree and court sale the property belonged to defendant 3 and was liable to be attached and sold in execution of the decree in this case. This contention was upheld by the execution court and the claim petition dismissed. Additional defendant 12 has therefore filed this appeal.

2. The hypothecation bond on which additional defendant 12 has obtained the decree relied upon by him is Ex.VI

executed by his father, defendant 3, to one Subramonia Iyer in 1105. In partial discharge of that hypothecation bond one of the properties comprised in Ex. VI was sold by defendant 3 to Subramonia Iyer on 28.1.1110. Ex. IX is the sale deed executed by defendant 3 in favour of Subramonia Iyer. On the same date two other documents, viz. Exs. VII and VIII, were also executed by Subramonia Iyer and additional defendant 12. By Ex. VII a property standing in the name of additional defendant 12 at Mundakayam was sold to Subramonia Iyer for the balance due to him under Ex. VI after the execution of Ex. IX, and by Ex. VIII Subramonia Iyer assigned to additional defendant 12 the right he had for the balance amount due under Ex. VII after the execution of Ex. IX. Additional defendant 12 claims that under these two documents, he obtained the right to the balance amount subsisting under Ex. VI after the execution of Ex. IX in exchange for his property at Mundakayam. According to him, for the balance amount thus due to him under Ex. VI he has obtained the decree in O.S. No. 13 of 1122 of the Kottayam District Court and purchased the property now attached by the decree-holder in this suit and the attached property therefore belongs to him. The decree-holder's contention is that the property at Mundakayam really belonged to defendant 3, and not to additional defendant 12, and by the execution of Exs. IX and VII the whole liability under Ex. VI was discharged. The decree-holder contends that after so discharging Ex. VI a sham assignment of it was taken by defendant 3 and additional defendant 12 in the name of additional defendant 12 with a view to defraud the creditors of defendant 3 and shield the latter's property and that the decree and execution proceedings in O.S. No. 13

of 1122 were then brought into existence for carrying out this object. From the evidence of additional defendant 12 himself it appears that he was only nineteen years old when the property at Mundakayom was purchased. He claims that the said property was purchased with his wife's dowry and the profits of a business which he was running at Moor in Shertthailai Taluk to which place his wife belongs. There is, however, no document or other reliable evidence to show that additional defendant 12 had received a dowry of Rs. 1000/- or that he was running a business even when he was a mere boy. It is also difficult to believe the story that additional defendant 12 sold a valuable property at Mundakayom merely for taking in exchange a hypothecation bond executed by his father. Although the assignment, Ex. VIII, was taken on 28.1.1110 the father's liability under the hypothecation bond was not sought to be enforced until the latter had filed a petition under the Debt Relief Act. In 1118 defendant 3 filed a petition under the Debt Relief Act and obtained a stay of the decrees which were then being executed against him, including the decree in the present case. It was while the stay order was in force that additional defendant 12 instituted O.S. No. 13 of 1122. The decree itself was passed as a result of a compromise, and the execution sale and delivery soon followed without any opposition from the defendants in the suit. The Managing Director of the decree-holder Bank has deposed as P.W.1 that defendant 3 was heavily indebted at the time of Exs. VII, VIII and ~~IX~~ <sup>IX</sup>. The debt relief petition filed by defendant 3 in 1118 also shows that he was heavily indebted not only at the time of Exs. VII, VIII and IX but both before and after that. In the circumstances, we have absolutely no

doubt of the fact that Ex. VIII is a sham assignment deed taken in the name of additional defendant 12 after Ex. IX was discharged by the execution of Exs. VII and IX and that it was taken with the object of defeating the creditors of defendant 3 and shielding his properties from them. We hold that the decree, court sale and delivery relied upon by additional defendant 12 are also sham transactions and that notwithstanding the said decree, court sale and delivery the property attached by the decree-holder Bank belonged to defendant 3 at the time of the attachment and was liable to be attached and sold in execution of the decree in this case.

3. The claim petition of additional defendant 12 was dismissed on a former occasion also by the lower court, and the order passed on that occasion by the lower <sup>court</sup> was set aside in appeal by this Court and the petition remanded for fresh enquiry and disposal. The appellant's counsel contended that as all the grounds now relied upon by the lower court for dismissing the claim petition were relied upon by the lower court on the former occasion also, **the** lower court was wrong in dismissing the petition again on the same grounds. It is seen from the remand order that the remand was ordered on that occasion in order to afford an opportunity to the parties to explain the facts and circumstances appearing in the case. After the remand both additional defendant 12 and the Managing Director of the decree-holder Bank were examined. The evidence of the claimant has served only to expose the hollowness of his contention that it was with his own funds that the property at Lundakayom was purchased. Even from his evidence it is

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clear that Ex. VIII could not have been a genuine trans-  
action. According to him, he sold the Mundakayom prop-  
erty in exchange for the hypothecation right against his  
father because he found it impossible to live at Mundakayom  
on account of rheumatism. A man who was thinking of  
winding up his business was likely to have sold or yield-  
ing property in exchange for a hypothecation bond which he  
had to enforce against his own father. On the whole we  
are satisfied that the appellants' contention were rightly  
repelled by the lower court. We therefore confirm the  
lower court's order and dismiss this appeal with costs.

23rd March 1955.

Companis Ltd.

affidavit

Y. N. M. J. O. M.

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1 New court

W. N. M. J. O. M.

Deputy Registrar  
for Registrar